Supreme Court, U.S.
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No. 92-578

In The

Supreme Court of the United States

October Term, 1992

CYRUS ZAL,

Petitioner,

v.

CECIL STEPPE, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

LIST OF PARTIES

Respondent, Cecil Steppe, is the Chief Probation Officer for the County of San Diego. The County of San Diego is a public entity and a political subdivision of the State of California.

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STATEMENT OF FACTS

Respondent, Cecil Steppe, erroneously described by petitioner as "Warden," is actually the Chief Probation Officer for the County of San Diego. It was to Mr. Steppe's custody that petitioner, Cyrus Zal, was eventually committed for the purpose of serving out the sentence imposed by the Honorable Larrie R. Brainard, Judge of the Municipal Court of the County of San Diego, El Cajon Judicial District. Judge Brainard found petitioner, who is an attorney, guilty of committing 20 separate acts of direct contempt of court during the course of

petitioner's representation of 7 defendants charged with misdemeanor trespass at a family planning clinic in La Mesa, California.

Respondent otherwise incorporates the statement of facts contained in the opinion of the Court of Appeals for the Ninth Circuit. That opinion is reprinted in its entirety at the Appendix to Petitioner's Brief, pp. A-1 through A-27.

REASONS FOR DENYING THE WRIT

I

THERE IS NO CONFLICT BETWEEN THE CIRCUITS OR WITH PRECEDENT OF THIS COURT

Petitioner has cited no decision of a circuit court as being in conflict with the opinion of the circuit court below. Petitioner instead urges this Court to grant certiorari because the opinion below purportedly conflicts with this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey* (1992) 505 U.S. ___ [120 L.Ed.2d 664, 708] (601 L.W. 4795) and *Roe v. Wade* (1973) 410 U.S. 113, 156 [35 L.Ed.2d 147]. Petitioner argues the opinion below "conflicts" because the circuit court refused to address an issue petitioner raised on appeal, i.e., whether a fetus has Fifth and Fourteenth Amendment rights.

This Court's rulings in *Planned Parenthood* and *Roe* do not conflict with the circuit court's opinion below because a ruling on the fetal rights issue was simply not necessary to decide whether petitioner was entitled to habeas

corpus relief on the contempt convictions. Petitioner claimed he was entitled to habeas corpus relief because the state Municipal Court lacked jurisdiction to issue the evidentiary orders at his clients' criminal trial. The fetal rights issue was legally irrelevant at that time, as it is now.

II

THIS CASE PRESENTS NO NOVEL ISSUE, AND WAS FULLY CONSIDERED AND CORRECTLY DECIDED BY THE COURT BELOW

This case presents no novel issue affecting the United States Constitution or a federal statute. Petitioner would have this Court believe that because he and the clients he represented at the criminal trial acted out of adherence to their firmly held moral beliefs, petitioner's acts of contempt were not punishable. However, the United States Constitution does not give to petitioner or his clients the right, in the course of a criminal trial, to posit legally irrelevant arguments, offer legally irrelevant explanatory statements and present irrelevant evidence, in direct violation of a trial court's in limine rulings.

Petitioner attempts to create certain legal issues out of the facts of this case, but to which the facts do not lend themselves. He wants to use this case as a vehicle by which to overturn this Court's decisions in *Planned Parenthood, supra,* and *Roe v. Wade, supra.* For the reasons described below, the trial court, the district court and the circuit court each correctly recognized this case as presenting simple contempt of court issues. The circuit court

has fully considered the facts and correctly decided the real issues. This Court therefore should deny certiorari.

III

PETITIONER'S FIRST AMENDMENT RIGHTS AS DEFENSE COUNSEL WERE NOT ABRIDGED BY THE TRIAL COURT'S IN LIMINE ORDERS

The circuit court correctly decided, on the basis of *Sacher v. United States* (1951) 343 U.S. 1 [96 L.Ed. 717] and *Gentile v. State Bar of Nevada* (1991) 501 U.S. ___ [115 L.Ed.2d 888] that petitioner's First Amendment rights were not violated by the evidentiary orders issued by the trial court. Consistent with the law in California, as explained in the case of *In Re Berry* (1968) 68 Cal.2d 137, 436 P.2d 273, a person may choose to disobey an order of the state court and raise jurisdictional contentions when he is sought to be punished. (*Id.* at 149, 436 P.2d 281.) If not unconstitutional, then the contempt citation is not void. The question was therefore properly whether the trial court had jurisdiction to issue its in limine orders.

In *Sacher, supra,* this Court ruled that an attorney has no right, in the face of an adverse ruling from the bench, to resist or to insult the judge. "His right is only respectfully to preserve his point for appeal." (*Sacher, supra,* at 343 U.S. 9, 96 L.Ed. at 723.) Using similar language in *Gentile, supra,* this Court noted that an attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. (*Gentile, supra,* 115 L.Ed.2d at 921.)

Here, petitioner not only intentionally violated the trial court's orders excluding certain defenses, he "welcomed the contempt citations." (Appendix A-31.) As the circuit court then noted:

> "The *only* question before us is who controls the trial. Under our current system, the trial judge is charged with preserving the decorum that permits a reasoned resolutions [sic] of issues. Zealous counsel cannot flout that authority behind the shield of the First Amendment. We hold nothing more." (Appendix, A-12; emphasis in original.)

As Judge Trott noted in his concurring opinion below, petitioner could only claim First Amendment issues when the "speech" excluded was *improperly* excluded.

> "And the operative word, 'improper,' obtains its meaning by reference to the *client's trial rights.*
>
> . . . .
>
> " . . . In a courtroom, a lawyer without a client is like an actor without a part: he has no role to play, and no lines to deliver.
>
> " . . . If a plaintiff or defendant has no trial right to present evidence or testimony, then the evidence or testimony may not be presented. In a courtroom, during a judicial proceeding, the First Amendment simply does not protect speech which exceeds the speaker's trial rights. Until today, I would have thought this proposition too obvious for comment." (Appendix, A-18 to A-19.)

Judge Noonan, writing separately and concurring in the result, agreed stating:

> "But when Zal used the forbidden words to ask the question of witnesses, he was unquestionably functioning on his clients' behalf. He was not exercising his own First Amendment right. His speech was used for his clients. It is fair to measure his rights by theirs." (Appendix, A-24.)

The circuit court correctly decided that petitioner's First Amendment rights had not been violated by the trial court's in limine evidentiary orders.

IV

PETITIONER'S CLIENTS' CONSTITUTIONAL RIGHTS TO A JURY TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, AND DUE PROCESS OF LAW WERE NOT DENIED BY THE TRIAL COURT'S IN LIMINE ORDERS, ESPECIALLY SINCE THE TRIAL COURT ALLOWED PETITIONER'S CLIENTS ONE EXPLANATORY STATEMENT TO THE JURY DURING THE TRIAL

Petitioner's argument that his clients' constitutional rights were violated through the trial court's in limine orders fails for two significant reasons. First, in California, abortion is not illegal. (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 284, 625 P.2d 779.) Petitioner's clients insisted they had a right to present a "necessity" defense to the misdemeanor trespass charges, arguing that they violated the law in order to save the lives of unborn children. But, they chose to violate a law that was not, itself, the object of their protest. A "necessity defense" is inapplicable to a case of indirect civil disobedience. (*United States v. Schoon* (9th Cir. 1991) 955 F.2d 1238, 1240; see also *Northeast Women's Center, Inc. v. McMonagle* (3rd Cir. 1989) 868 F.2d 1342,

1350-52, cert. den., 493 U.S. 901 [107 L.Ed.2d 210] [justification defense against trespassing charges held unavailable to abortion protesters under both federal and state law]; and *United States v. Malinowski* (3rd Cir. 1973) 472 F.2d 850, cert. den., 411 U.S. 970 [36 L.Ed.2d 693] [taxpayer's good faith belief in the immorality and illegality of the Vietnam War as motive for violating law against wilfully false claims for tax withholding exemptions not a legal defense].) Petitioner cites no case identifying a constitutional right to present any of the defenses excluded by the trial court's in limine orders.

Second, petitioner's argument fails to account for the fact that the trial judge in fact allowed his clients one opportunity to explain their actions to the jury. This was apparently unsatisfactory to petitioner, because he persisted in his mission to proselytize the jury. Even in partially dissenting from the circuit court's opinion, Judge Noonan agreed the trial court handled the matter evenhandedly, stating:

> Repeated reference to the business of the abortion clinic went beyond explanation in an effort to enlist the jury's sympathy in the defendants' cause. . . . It was within the discretion of the court to prevent what it thought to be unnecessary recurrence to this theme.
>
> " . . . The court did not have to permit repeated introduction of abortion into the trial. Repeated, the issue was irrelevant. The court's order was, therefore, constitutional." (Appendix, A-26, A-27.)

Petitioner's clients' constitutional rights were not denied, as the circuit court correctly decided.

V

PETITIONER'S CLIENTS HAVE NO RIGHT TO APPEAL TO THE JURY, THROUGH THEIR DEFENSE COUNSEL, FOR "NULLIFICATION" OF THE TRIAL COURT'S INSTRUCTIONS ON THE LAW

Petitioner urges this Court to grant certiorari because every accused has the right to "directly appeal to the jury to exercise its powers of nullification." A jury cannot be exhorted to ignore the judge's instructions on the law. "Verdicts must be based on the law and the evidence, *not* on jury nullification as urged by either litigant." (Appendix, A-15, Judge Trott, concurring.) And, extending to defense counsel, as a right, permission to argue to the jury that they should disregard the court's instructions on the law is a "fundamentally lawless act . . . not protected by the Constitution." (Appendix, A-14, Judge Trott, concurring.)

> If we take seriously Zal's argument – if we allow lawyers to appeal for jury nullification at will and indefinitely, and if we grant defendants a Sixth Amendment right to explain themselves in legally irrelevant terms – then we move to a 'system' in which the loudest voice carries the day, in which the phrase 'order in the court' literally has no meaning, and in which the law has about as much force as the Cheshire Cat's grin. (Appendix, A-16.)

Petitioner's clients have no right to argue "jury nullification." This Court should deny certiorari.

CONCLUSION

There is no reason for this Court to grant the petition for certiorari since petitioner has identified no conflict among decisions of the circuits, there is no conflict with precedent of this Court, the case presents no novel issue of constitutional importance, and the circuit court fully considered and correctly decided the case below.

Petitioner has no First Amendment right to commit acts of contempt of court where his speech has been properly excluded. While he may zealously pursue relevant defenses, and in the face of adverse rulings preserve the points for appeal, violation of orders that the court has jurisdiction to issue subjects defense counsel to the consequences.

Petitioner's clients' rights to due process, jury trial, and effective assistance of counsel were not abridged by the trial court's rulings, which were consistent with sound precedent that the "necessity defense" was inapplicable to a wilful violation of a statute that was not the subject of the protest.

Finally, neither petitioner nor his clients had any right to argue "jury nullification." For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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